No. 10,540

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants in the above entitled cause (No. 10,540) respectfully petition the United States Circuit Court of Appeals for the Ninth Circuit, its Presiding Judge and Associate Judges, to grant a rehearing upon the following grounds:

(1) The Court has erroneously decided that there is nothing on the face of Revised Maximum Price Regulation No. 169 to indicate that the Secretary of Agriculture has not approved it.

(2) The Court has erroneously decided that there is no requirement of law that it appear on the face of Revised Maximum Price Regulation No. 169 that approval thereof by the Secretary of Agriculture has been had.

(3) The Court has erroneously decided that Appellants' claim that Revised Maximum Price Regulation No. 169 did not become effective and enforcible is no more than a claim that said Regulation is invalid.

(4) The Court has erroneously decided that no error was committed by the trial court in overruling appellants' motion for permission to withdraw their pleas of "guilty" and re-enter their former pleas of "not guilty."

ARGUMENT.

I.

Revised Maximum Price Regulation No. 169 Shows on Its Face That It Was Not Approved as Required by Section 3(e) of the Emergency Price Control Act.

In its opinion herein this Honorable Court stated that:

> "There is nothing on the face of the Regulation to indicate that the Secretary of Agriculture has not approved it, * * *."

This statement of the Court does not take into consideration the requirement of law that all Regulations promulgated by the Price Administrator must, before they can become effective, be published in the Federal Register, and that when so published it will be presumed that the copy published therein is a true copy of the original thereof. (Sections 305 and 307 of Title 44 U. S. C. A.)

In this connection, Section 307 of Title 44 U. S. C. A. provides, in part, as follows:

> "The publication in the Federal Register of any document shall create a rebuttable presumption * * * (c) that the copy contained in the Federal Register is a true copy of the original; * * *."

The copy of Revised Maximum Price Regulation No. 169 published in the Federal Register (hereinafter referred to as Regulation No. 169) must therefore be presumed to be a true copy of the original promulgated by

the Administrator. The copy published in the Federal Register shows on its face that it was not signed by the Secretary of Agriculture or by the War Food Administrator, and hence it must be presumed that the original thereof was not signed by either of said officials. In turn, this creates a presumption that the original Regulation was not approved by said officials, or either of them, as required by the Act.

It should be noted that Regulation No. 169 is an act of administrative legislation. It is analogous to an Act of Congress; and it was issued under a specific delegation of legislative power by the Congress to the Price Administrator *and the Secretary of Agriculture* in so far as agricultural commodities are concerned. The Congress saw fit to require the joint action of the Price Administrator and the Secretary of Agriculture in the fixing of maximum prices for agricultural commodities, and neither of those officials alone has power to promulgate Regulations fixing such prices without the action or approval of the other. It was the obvious purpose of Congress to require such joint action before this administrative legislation could lawfully be enacted or become effective as law.

The requirement of the Act that, as to agricultural commodities a Regulation issued by the Price Administrator must have the "*prior* approval" of the Secretary of Agriculture before it can become effective is mandatory. That requirement is as absolute as the constitutional requirement that an Act of Congress must be passed by both

the House of Representatives and the Senate before it can become law. It is as absolute as the constitutional requirement that a treaty negotiated by the President must be approved by the Senate before it can become effective.

It is not contended by Appellee that Regulation No. 169 was approved by the Secretary of Agriculture or by the War Food Administrator. The burden of appellee's argument throughout this case has been that a side of beef is not an agricultural commodity and that therefore approval of the Regulation by the Secretary of Agriculture was not necessary. But this argument ignores the provisions and definitions contained in the Regulation and Act. (See Appellants' Supp. Br., pp. 5-11, and the authorities there cited.) Moreover, it affirmatively appears from the official proceedings of a Congressional Committee that Regulation No. 169 was not approved by the Secretary of Agriculture or by the War Food Administrator prior to the publication thereof in the Federal Register, or at any other time. (See Hearings before the Special Subcommittee of the House Committee on Agriculture, Thursday, October 28, 1943: Specifically, the testimony of Dr. Richard B. Gilbert, Chief Economist of the Office of Price Administration.)

For these reasons Regulation No. 169 did not become effective as to agricultural commodities, and hence the alleged violation thereof did not constitute an offense against the laws of the United States.

II.

It Is Settled Law That Legislative Bills Shall Be Signed by the Executive as Evidence of His Approval Thereof.

It is clear that an administrative Regulation, such as is here involved, is legislation and is the equivalent of an Act of Congress. As such legislation it is on general principles subject to the same rules and requirements for the approval thereof that are applicable to Acts of Congress and State Legislatures. The "prior approval" of a Regulation, relating to an agricultural commodity, before it can become effective, is comparable to the approval of Acts of Congress by the President, or to the approval of legislation by the Governor of a State. As to these, it is the general rule that "approval" thereof must appear by the signature of the chief executive. Brief reference to the authorities so shows.

In 25 *R. C. L.* 886, Section 136, the general rule here applicable is stated as follows:

> "The constitutions of the United States and nearly all the states contain provisions to the effect that every bill which shall have passed both houses of the legislature shall be presented to the chief executive; *if he approves he shall sign it* . . ." (Italics ours.)

To the same effect are 50 *Am. Jur.* 107, Section 105; 50 *C. J.* 582, Section 110.

The rule stated by the text writers, *supra,* is peculiarly applicable to federal legislation because of constitutional provisions and requirements. These provisions and requirements set a pattern for the approval of *all* federal legislation.

The Constitution of the United States (Art. I, Section 7, clause 2) provides that after passage of a bill by both houses of Congress it shall be presented to the President and "if he approves he shall sign it." This provision is mandatory. (*Gardner v. Collector*, 6 Wall. 506, 18 L. Ed. 890.) No other method of approval of federal legislation is provided by the Constitution.

The Constitution of the State of California contains a like provision which was construed by the Supreme Court of that State in the case of *Lukens v. Nye,* 156 Cal. 498. In that case the Court said, at page 503:

> "If he approves a proposed bill, his duty requires him to sign it as evidence of his approval . . . His (the Governor's) signature, when it is shown to have been attached, is the exclusive and conclusive evidence of his unqualified approval, and the result being law, no evidence, nor the judgment of any court can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force."

The constitutional provisions referred to were designed to prevent doubt and uncertainty as to whether each and every step necessary to enact legislation was duly taken, so that the public and the courts may know that what purports to be law is indeed the law. No good reason can be adduced for excepting administrative legislation from the operation of the rule invoked. On the contrary, reason as well as authority demands that administrative legislation shall be subject to the provisions and requirements of the Constitution relating to the passage and approval of congressional legislation.

It should again be noted, in this connection, that the Regulation shows on its face that it was not approved by the Secretary of Agriculture or War Food Administrator. Moreover, the official proceedings of the Special Subcommittee of the House Committee on Agriculture supply ample evidence that Regulation No. 169 was not approved as required by Section 3(e) of the Act *(supra)*.

III.

The District Court and This Court Have Jurisdiction to Determine That Regulation No. 169 Did Not Become Effective as to Agricultural Commodities.

In the several briefs filed herein prior to the decision of the Supreme Court of the United States in *Yakus v. United States*, ... U. S. ....., 88 L. Ed. (Adv.) 653, a considerable portion of the arguments of appellants and appellee was upon the question of the *constitutional validity* of the Emergency Price Control Act and Revised Maximum Price Regulation No. 169. Following that decision appellants filed a supplemental brief upon the questions remaining in this case. One of the points discussed therein was that

> "Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381), if otherwise valid and effective, does not cover and is without application to the offense charged in Count I of the Information." (Appellants' Supp. Br. p. 5.)

The gist of appellants' argument upon that proposition was that Regulation No. 169 did not become effective as to agricultural commodities, because it was not approved by the Secretary of Agriculture or by the War Food Administrator, as required by Section 3(e) of the

Emergency Price Control Act. And, in this connection appellants showed that a side of beef or "beef carcass" (such as they were charged with selling at a price in excess of the price alleged to have been fixed by the Price Administrator), is an agricultural commodity. (Appellants' Supp. Br. pp. 5-11.)

In disposing of this proposition and argument this Honorable Court said (Opinion p. 5):

> "It (Regulation No. 169) may or may not have been approved, but that is not here pertinent for we are of the opinion that appellants' claim that the Regulation did not become enforcible is no more than a claim that the Regulation is invalid. * * * The district court and this circuit court of appeals have no jurisdiction to consider the contention that the Regulation in invalid. Yakus v. United States, Case No. 374, decided by the Supreme Court March 27, 1944, ... U. S. ....."

Appellants earnestly insist that in so deciding this Honorable Court has failed to consider the distinction between a Regulation that is constitutionally invalid and a Regulation that never came into existence for some other reason. Let us illustrate, if possible, this distinction. If a Bill of Congress is passed by the House but is not passed by the Senate it simply does not come into existence as a law. For a Court to so hold would in no sense involve deciding that the provisions thereof are constitutionally invalid.

It may be urged, however, that for the Court to hold that the Regulation never came into legal existence would be to hold that it is "invalid" within the purview of the decision of the Supreme Court in *Yakus v. United States,*

supra. We do not believe that the *Yakus* decision is that inclusive, or that it is applicable to every conceivable kind of invalidity of a Price Regulation. Of great significance in this connection is the following statement of the Supreme Court in the *Yakus Case* (..... U. S. ....., 88 L. Ed. 672):

> "We have no occasion to decide whether one charged with criminal violation of a *duly promulgated* price regulation may defend on the ground that the regulation is unconstitutional on its face. * * * *There is no contention that the present regulation is void on its face,* petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial." (Italics ours.)

If, as may be contended by appellee, the Supreme Court's decision was intended to prevent a defendant in a criminal prosecution from defending on the ground that the Regulation is unconstitutional, or void, on its face, then the above quoted language of the Court is not only pure dictum but is also utterly meaningless and confusing. It

can hardly be presumed that the Supreme Court would gratuitously inject into its opinion such a statement without good reason for so doing, but whatever meaning may be attributed to the statement of the Court, *supra,* it cannot be questioned that the Court intended to and did reserve for future decision, when the occasion should properly arise, the right of a defendant on trial for violation of a Price Regulation to defend on the ground that it is unconstitutional, or void, on its face. Therefore, that question is wide open for decision at this time.

It should be noted in the *Yakus Case* there was no contention that the regulation was void on its face, or that it was not duly promulgated. There was only the contention that both the Act and the Regulation were constitutionally invalid.

In the case at bar appellants have contended at all times that Regulation No. 169 never became effective because it was not duly promulgated—that is, it was not approved by the Secretary of Agriculture before its attempted promulgation by the Price Administrator as required by law. Therefore, the regulation is void on its face and may be challenged under the reservations made by the Supreme Court in the *Yakus* decision, *supra.*

It is apparent that if the Supreme Court had believed that the validity of a Regulation, void on its face, could not be challenged by a defendant charged with the violation thereof in a criminal proceeding, it could have so held. The meaning of the Court's statement reserving that question for future decision is therefore important.

As bearing upon the meaning of the quoted language of the majority opinion is the statement of Mr. Justice Rutledge in his dissenting opinion, in which Mr. Justice Murphy concurred. It was there said (88 L. Ed. 691):

> "From what has been said it seems clear that Congress cannot forbid the enforcing court, exercising the criminal jurisdiction, to consider the constitutional validity of an order (Regulation) *invalid on its face*. Any other view would permit Congress to compel the courts to enforce unconstitutional laws." (Italics ours.)

And, we may well add, that "any other view would permit Congress to compel the courts to enforce" a Regulation that never came into existence, or that is void on its face.

It is well settled that an unconstitutional statute, or a wholly void statute, is as inoperative as if it had never been passed, and the courts are not bound to enforce it. The same is true of an administrative order or Regulation which is void on its face, for certainly in this respect a mere administrative order could have no higher standing before the courts, or in law, than an act of the legislature.

In 6 *R. C. L.* 117, Section 117, it is said:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Since an unconstitutional law is void, it imposes no duties and confers no power or authority on any one; it affords no protection to any one, and no one is bound to obey it, and no courts are bound to enforce it."

Many cases, both State and Federal, are cited in support of the textual statement, *supra*. See, especially, *United States v. Realty Company*, 163 U. S. 427, 41 L. Ed. 215; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. Ed. 966. In the latter case the Supreme Court said (57 L. Ed. 969):

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not law, and can neither confer a right or immunity nor operate to supersede any existing valid law. *Norton v. Shelby County*, 118 U. S. 425, 442, 30 L. Ed. 178, 186, 6 Sup. Ct. Rep. 112; *Ex parte Siebold*, 100 U. S. 371, 376, 25 L. Ed. 717, 719."

IV.

This Court Has Erroneously Decided That No Error Was Committed by the Trial Court in Overruling Appellants' Motion for Permission to Withdraw Pleas of Guilty and Re-enter Pleas of Not Guilty, and for a New Trial.

It is apparent that the majority opinion is based, in large measure, upon a misconception of the facts in evidence. This misconception clearly appears from the following statements in the opinion (pp. 6, 7):

> "There was testimony to the effect that before the pleas of guilty were entered the report of the Probation Officer's recommendations were read to the attorney for appellants. . . . The attorney for the appellants denied that the recommendations of the Probation Officer had been read to him before the pleas of guilty were entered. The resolving of the conflicting evidence was within the discretion of the trial court."

If, as this language implies, the decision of this Court rests upon the assumption that appellants pleaded guilty with full knowledge of the recommendations of the Probation Officer, then it has no basis in fact whatsoever. The record shows that appellants pleaded not guilty on August 2, 1943 [R. 13-14]; that after some negotiations with the United States Attorney and OPA Attorneys, they changed their pleas to guilty as to Counts I and III on August 11, 1943 [R. 15-16]; that the trial court referred the matter to the Probation Officer on the same day, that is, August 11, 1943 [R. 15]; and that the report was filed on or about August 30, 1943 [R. 78-79]. It thus unmistakably appears that the Probation Officer's report was not made until approximately two weeks after pleas of guilty had been entered. In so far, therefore, as the Court's opinion rests upon the language of the opinion quoted, *supra,* it is clearly erroneous.

The Record Shows That There Was an Understanding and Agreement Between Appellants and the Government That Only Moderate Fines and No Sentence of Imprisonment Would Be Imposed.

It is not necessary here to restate in detail the evidence about the understanding and agreement which induced appellants to change their pleas from not guilty to guilty. But reference to the affidavit of Mr. Kinnison, Assistant United States Attorney, is alone sufficient to show that the understanding and agreement relied on was reached. [See R. 75-80.] Mr. Kinnison testified that he talked with appellants' counsel on August 6, 1943, again on August 7, 1943, and on August 10, 1943, about the pro-

posed change in pleas. Mr. Kinnison testified [R. 78] that on August 10, 1943:

> "Your affiant advised Mr. Preston that it was the custom of that (United States Attorney's) office not to recommend a specific amount as to a fine. Mr. Preston then requested your affiant to discuss the matter with the probation office and advised him thereof.
>
> "Thereafter, on the same day, your affiant talked to Mr. Meader, of the probation department, giving him the facts of the case and stating that Mr. Preston had suggested the amount of Five Hundred ($500.00) Dollars as being a reasonable amount to fine the defendants. Mr. Meader stated that upon the facts stated, if the defendants had no prior record, 'and all other things being equal,' the probation office would undoubtedly recommend a 'moderate fine.' Thereafter, on the same day (August 10, 1943) your affiant called Mr. Preston on the telephone and repeated to him the statements made by Mr. Meader. Arrangements were then made to advance the case upon the calendar for defendants to change their plea."

The following day, August 11, 1943, the defendants changed their pleas on Counts I and III.

Under Mr. Kinnison's evidence alone, it cannot be doubted that he transmitted to the Probation Officer the "suggestion" of appellants' counsel and that defendants be fined a total of $500.00 on Counts I and III, and that the Probation Officer agreed to recommend such a fine if defendants had no prior criminal record. Nor can it be doubted that Mr. Kinnison transmitted said agreement of the Probation Officer to Appellants' counsel and that on

the basis thereof *"arrangements were then made . . . to change their pleas" the following day.* Moreover, it cannot be doubted that a sentence of imprisonment was never contemplated by the United States Attorney, or by the Probation Officer, or by appellants and their attorneys. Indeed, imprisonment was specifically excluded from all conversations and negotiations.

The United States Attorney and the Probation Officer Failed to Live Up to the Understanding and Agreement.

The record shows that the Probation Officer recommended [R. 79]:

> "Because of the clear past record of these defendants, penitentiary sentence is not recommended. It is recommended that they be given a heavy fine and placed on probation."

This was a violation of the understanding and agreement that "the probation office would undoubtedly recommend a 'moderate fine.'" A fine of $1,000.00 for each defendant is obviously not moderate, but exceedingly heavy. It was certainly in violation of what Mr. Kinnison told appellants' attorneys the Probation Officer had agreed to recommend to the trial court.

It should be observed that the Probation Officer's recommendation refers to "the clear past record of these defendants." This finding required that in conformity with the agreement, the Probation Officer recommend a "moderate" fine, or specifically the aggregate fine of $500.00 for both defendants, since the change of pleas was based upon the Probation Officer's agreement to recommend that amount if defendants "had no prior record."

The Trial Court Disregarded the Probation Officer's Recommendation and the Agreement in Material Respects.

While it is manifest that the Probation Officer did not keep the agreement made, it is also manifest that the trial court entirely disregarded it in the imposition of a jail sentence upon defendant Aron Rosensweig and fines upon both defendants greatly in excess of the amount agreed on.

It is conceded that the trial court had both power and discretion to disregard recommendations of counsel and the Probation Officer. But where, as here, it clearly appeared that the defendants had changed their pleas of not guilty to guilty upon the agreement or promise of Government Officers to recommend sentences involving only moderate fines *and no imprisonment,* it was an abuse of discretion for the trial court to refuse permission to defendants to change their pleas if the court intended to disregard both the recommendations and the agreement.

Under These Facts the Trial Court Should Have Permitted Defendants to Withdraw Their Pleas of Guilty, and Should Have Granted a New Trial.

In numerous cases, where the facts were not more favorable to the defendants involved, the Courts have held that it was error and an abuse of discretion for the trial court to refuse leave to withdraw pleas of guilty and substitute therefor pleas of not guilty. Some of these cases have been cited and quoted from in appellants' several briefs filed herein. See,

United States v. Fox, 130 F. 2d 56, 59;

Kercheval v. United States, 274 U. S. 220, 71 L. Ed. 1009;

United States v. Woody, 2 F. 2d 262;

Deutsch v. Aderhold, 80 F. 2d 677, 678;
Paris v. United States, 137 F. 2d 300;
Clemons v. United States, 137 F. 2d 302;
People v. Schwarz, 201 Cal. 309;
Camarota v. United States, 2 F. 2d 650, 651.

See, also, Appellants' Op. Br. pp. 19-23; Appellants' Rep. Br. pp. 32-38; and Appellants' Supp. Br. pp. 12-23, for discussion of this question.

The decision of the Circuit Court of Appeals in *Ward v. United States,* (6 Cir.) 116 F. (2d) 135, is also squarely in point. In that case the facts, as stated by the Court, were as follows.

> "Appellant * * * was indicted for violation of the mail fraud statute, 18 U. S. C. A. Section 338, and for conspiring to commit that offense * * *. He first pleaded not guilty to both indictments. Counsel for the United States thereafter sought to induce him to change his pleas and testify against others considered more deeply involved. They promised to recommend a sentence that would involve no imprisonment and assured appellant that pleas of guilty would result in no more than a fine, or suspended sentence, or both, though they said they could not state definitely what punishment would be imposed. They made these statements in good faith and after discussion with the trial judge. Relying thereon, appellant entered pleas of guilty, * * *."

Learning later, when sentence was about to be pronounced upon him, that the trial court did not intend to follow the recommendations of government counsel, the appellant Ward asked leave to withdraw pleas of guilty

and institute therefor pleas of not guilty, which the court refused. The Appellate Court said, pp. 136, 137:

> "The sole question here presented is whether it was reversible error to refuse leave to withdraw the pleas of guilty, on the basis of which the foregoing sentences were imposed.
>
> "(1) We do not find that this question has been decided by any federal appellate court. The prevailing view, however, appears to be that the trial court's denial of leave to withdraw a plea of guilty is examinable on review to determine whether such denial is in accord with the exercise of a sound judicial discretion. State v. Maresca, 85 Conn. 509, 83 A. 635; Gardner v. People, 106 Ill. 76; Myers v. State, 115 Ind. 554, 18 N. E. 42; Little v. Commonwealth, 142 Ky. 92, 133 S. W. 1149, 34 L. R. A., N. S., 257, Ann. Cas. 1912D, 241; State v. Hill, 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687.
>
> "(2) It is not error to refuse leave to withdraw the plea if the defendant fully understood his rights, the nature of the charge against him, and the consequences of such a plea. Miller v. State, 160 Ark. 245, 254 S. W. 487; Pope v. State, 56 Fla. 81, 47 So. 487, 16 Ann. Cas. 972; State v. Raponi, 32 Idaho 368, 182 P. 855; State v. Williams, 45 La. Ann. 1356, 14 So. 32; Hubbell v. State, 41 Wyo. 275, 285 P. 153. On the other hand, it is error to deny leave to withdraw the plea when it was entered because of misunderstanding of its effect or because of misrepresentation. Krolage v. People, 224 Ill. 456, 79 N. E. 570, 8 Ann. Cas. 235; Mounts v. Commonwealth, 89 Ky. 274, 12 S. W. 311, 11 Ky. Law Rep. 474; State v. Nicholas, 46 Mont. 470, 128 P. 543; State v. McAllister, 96 Mont. 348, 30 P. 2d 821. There is ample precedent among the state court decisions for

the view that it is reversible error to refuse leave to withdraw the plea under circumstances such as appear in the case at bar. Griffin v. State, 12 Ga. App. 615, 77 S. E. 1080; East v. State, 89 Ind. App. 701, 168 N. E. 28; State v. Stephens, 71 Mo. 535; State v. Cochran, 332 Mo. 742, 60 S. W. 2d 1; Sloan v. State, 54 Okl. Cr. 324, 20 P. 2d 917."

The court concluded that the trial court erred in refusing leave to withdraw pleas of guilty, citing *Griffin v. State,* 12 Ga. App. 615, 77 S. E. 1087 in support of its decision.

In *Griffin v. State,* 12 Ga. App. 615, 77 S. E. 1087, *supra,* the court said:

"It was discretionary with the trial judge whether he would receive the plea of guilty at all. If he knew that it was entered under the mistaken belief, engendered by an agreement of state's counsel, that the punishment would be less than the maximum, the plea ought not to have been received until the accused had been admonished that the judge would not be bound by any such agreement. Of course, in theory, the accused knew that this was true; but if they, in fact, honestly thought the agreement would be carried out, then they ought to have relief from the plea. If the state is not bound by the agreement its counsel made, then the accused ought not to be held to their waiver, made on the faith of such agreement. That the accused were actually misled by the representations of state's counsel is undisputed, and, as illustrating the strong conviction of these able and upright attorneys that the accused had been misled by their statements, when the trial judge, in the exercise of his discretion, refused to abide by their agreement, they retired from the case and declined to attempt in the reviewing court to sustain the sentences imposed upon the accused."

The Action of the Trial Court in Denying Motions to Vacate Judgments Is Reviewable on This Appeal.

In the concurring opinion it is indicated that the abuse of discretion by the trial court is not reviewable here because the appeals were only from the judgments. This view overlooks the fact that the motion to vacate judgments and to permit withdrawal of pleas and to substitute other pleas therefor was also a motion for a new trial and as such is reviewable on the appeals from said judgments under Rule 3 of Rules of Criminal Procedure after Plea of Guilty or Verdict or Finding of Guilt. (18 U. S. C. A. following Section 688). Proceedings on said motion were interlocutory or ancillary to the judgments, hence reviewable.

Moreover, there is a conflict in the opinions of this court as to whether orders denying motions to vacate judgments are final and appealable. See *Republic Supply Co. of California v. Richfield Oil Co.;* 74 F. (2d) 909, at p. 910 where this Court through Judge Wilbur, said:

> "The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree, or order." (Citing numerous cases).

In *Bensen v. United States,* 93 F. (2d) 749, the defendant attempted to appeal from a motion to set aside the judgment of conviction and permit her to withdraw plea but did not appeal from the judgment itself. This Court, through Judge Denman, said, at p. 751:

> "It is conclusively settled that a ruling upon a motion to vacate a judgment, made in the same term and in the same cause in which the challenged judgment is entered, is not an appealable order." (Citing numerous cases).

These decisions simply mean that it is necessary to appeal from the judgment in order to present issues or matters interlocutory or ancillary or incidental thereto such as the motion here involved.

The Appellants, therefore, respectfully petition this Honorable Court to grant their petition for a rehearing, for the reasons herein stated and for the reasons stated in their briefs heretofore filed.

Respectfully submitted,

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By JOHN W. PRESTON,
Attorneys for Appellants.

Certificate.

We do hereby certify that, in our judgment, the foregoing petition for rehearing is well founded and we do further certify that said petition is not interposed for the purpose of delay.

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